No. 89-711

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNIVERSAL FABRICATORS, INC., PETITIONER

v.

CARL SMITH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

1. Whether an employee engaged as a structural fitter who spent a significant portion of his work time in activities expressly included in the statutory definition of maritime employment—the loading or unloading of vessels and the repair and building of vessels—was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 902(3) (1982 & Supp. V 1987).

2. Whether a yard adjoining navigable waters and used for the loading and unloading of vessels, as well as for the fabrication and repair of components for vessels and fixed offshore oil drilling platforms, is a covered situs under Section 3(a) of the LHWCA, 33 U.S.C. 903(a) (1982 & Supp. V 1987).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 878 F.2d 843. The decision of the Benefits Review Board (Pet. App. A9-A16) is reported at 21 Ben. Rev. Bd. Serv. (MB) 83. The decision of the administrative law judge (Pet. App. A17-A26) is reported at 20 Ben. Rev. Bd. Serv. (MB) 707 (ALJ).

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1989, and the petition for a writ of certiorari was filed on October 30, 1989 (a Monday).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Universal Fabricators, Inc., employed respondent Carl Smith from January 1981 to April 1982, primarily as a structural fitter who cut pieces of metal for use in building seagoing vessels and fixed offshore oil drilling platforms. During the course of his employment, Smith spent 126 days constructing a drilling barge, 66 days fabricating "stingers" (devices attached to vessels that lay pipe beneath the sea), five days repairing a component of a drilling tender, four days installing rubber bumpers on barge bumpers, two days constructing a walkway for a "jack-up" barge, at least five days loading barges, and 103 days building and repairing components for fixed offshore oil drilling platforms. Smith performed all his employment duties at petitioner's yard, which adjoined navigable waters. Pet. App. A2-A3, A10-A11, A19-A21.

On April 30, 1982, Smith suffered a back injury in petitioner's yard while placing a piece of floor plating that was to be installed on a fixed offshore oil drilling platform. As a result of the accident, Smith was totally and permanently disabled, and he has not worked since the date of the injury. Subsequently, on February 22, 1985, he filed a claim for compensation with respondent Department of Labor under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* Pet. App. A2-A3, A10, A19-A20.

2. The ALJ found that Smith satisfied the statutory eligibility requirements and awarded him benefits. Pet. App. A17-A26. The principal issues before the ALJ were whether the "status" and "situs" re-

quirements for coverage under Sections 2(3) and 3(a) of the Act were met. See 33 U.S.C. 902(3), 903(a) (1982 & Supp. V 1987).[1] After a hearing, the ALJ found that during the 15 months of Smith's employment with petitioner, he "worked all or part of at least 221 days in activities covered by the Act," *i.e.*, loading and unloading vessels and repairing and building vessels and their components. Pet. App. A23. The ALJ further determined that Smith had spent 103 days in non-covered tasks, *i.e.*, fabricating parts for fixed offshore oil drilling platforms. *Ibid.*, citing *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414 (1985). Relying on *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977), the ALJ held that because Smith spent "at least some of his time in covered activities," he satisfied the status requirement, even though he was not engaged in maritime employment at the time of his injury. Pet. App. A23.

The ALJ also concluded that Smith sustained his injury on a covered situs, finding that petitioner's yard "adjoined the navigable waters of the United States" and that after fabrication, the components for vessels and oil drilling platforms were customarily loaded onto barges for shipping at petitioner's yard. Pet. App. A21-A22. Noting that "the situs requirement simply mandates that the general area

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[1] Petitioner also contended that Smith's claim was untimely under Section 13 of the LHWCA, 33 U.S.C. 913 (1982 & Supp. V 1987). The ALJ rejected that contention on the ground that Smith's receipt of payments under the state workers' compensation act tolled the LHWCA's statute of limitations. Pet. App. A24. That ruling was affirmed by the Benefits Review Board (*id.* at A15) and the court of appeals (*id.* at A7-A8), and is not challenged in the petition for a writ of certiorari.

where a claimant is injured be customarily used for loading, unloading, repairing, dismantling, or building a vesel, and does not require the specific locus of the injury to be in such a place" (*id.* at A21), the ALJ determined that although the injury "did not occur at the locus of a maritime activity[,] * * * the general area of [petitioner's] fabrication yard was used for the maritime purpose of loading barges." *Id.* at A22.

3. The Benefits Review Board affirmed. Pet. App. A9-A16. The Board first rejected petitioner's argument that in determining whether Smith was engaged in maritime employment, the ALJ should have considered "the nature of the work which claimant was performing when he was injured, how long he had been assigned to the work, the sequence of work to which he was assigned immediately preceding the injury, and the fact that the employer was not engaged in shipbuilding work on the day of the injury." *Id.* at A12-A13. The Board explained that petitioner's "arguments * * * neglect that claimant need not have been engaged in maritime activities at the time of the injury as long as he spent 'at least some of [his] time' in covered activities" (*id.* at A13, quoting *Northeast Marine Terminal*, 432 U.S. at 273). The Board was unpersuaded by petitioner's contention that Smith's work constructing a drilling barge was merely a one-time project in maritime activity, because it ignored his other involvement in "loading and unloading component parts onto barges as well as his fabrication of scanners [stingers]," activities similar to those previously characterized as maritime by the Fifth Circuit. *Ibid.*, citing *Boudloche* v. *Howard Trucking Co.*, 632 F.2d 1346 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981), and *Howard* v. *Rebel Well Service*, 632 F.2d 1348 (5th Cir. 1980).

The Board also agreed with the ALJ's situs determination, Pet. App. A14, observing that "[t]he situs test simply requires that the general area in which claimant is injured be customarily used for [maritime tasks], and does not require that the area be exclusively used for maritime purposes." *Ibid.* Accordingly, in the Board's view, the ALJ properly held that "claimant was injured on a covered situs despite the fact that his injury did not occur at the locus of [petitioner's] maritime activities." *Ibid.*

4. The court of appeals affirmed the Board's ruling. Pet. App. A1-A8. The court first concluded that substantial evidence supported the finding that Smith spent a "significant portion of [his] time * * * in indisputably longshore operations," and therefore met the Act's status requirement. *Id.* at A5. Rejecting petitioner's reliance on *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533 (5th Cir. 1976), which indicated that an employee must actually have been performing or been directly involved in maritime employment at the time of the injury, the court noted that this Court's subsequent decision in *Northeast Marine Terminal*, as well as later Fifth Circuit decisions, establish that the LHWCA's coverage includes "persons whose employment is such that they spend at least some of their time in indisputably longshoring operations." Pet. App. A4-A5 (emphasis omitted), quoting 432 U.S. at 273. The court also affirmed the Board's situs determination, based on the ALJ's finding that petitioner "was engaged in maritime activities in an area adjoining the water." *Id.* at A6. The court rejected as "overbroad," and contrary to the express language of Section 3(a), petitioner's contention that the Act's protection should not extend to land-based workers such as Smith. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. In 1972, Congress extended the coverage of the LHWCA in order "to protect additional workers." S. Rep. No. 1125, 92d Cong., 2d Sess. 1 (1972). Congress first modified the Act's "situs" requirement by extending coverage shoreward. It thus expanded the definition of "navigable waters" under Section 3(a), 33 U.S.C. 903(a) (1982 & Supp. V 1987), to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." See *Chesapeake & Ohio Ry.* v. *Schwalb*, 110 S. Ct. 381, 385 (1989).

At the same time, Congress amended the definition of "employee" in Section 2(3), 33 U.S.C. 902(3) (1982 & Supp. V 1987), to describe affirmatively the class of workers in that area eligible for benefits. Congress accordingly added the requirement that the injured worker be "engaged in maritime employment," which it defined to "includ[e] any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, shipbuilder, and ship-breaker * * *." See *Northeast Marine Terminal*, 432 U.S. at 263-264. Applying this two-prong test for LHWCA coverage, the court of appeals correctly held that Smith satisfied the statutory requirements.

2. The court of appeals properly sustained the conclusion of both the ALJ and the Benefits Review Board that Smith was "engaged in maritime employ-

ment" within the meaning of Section 2(3). Smith worked for petitioner for approximately 15 months. The ALJ found that Smith spent a considerable part of this period in "loading or unloading vessels, and * * * in the repair and building of vessels and components of vessels" (Pet. App. A23), activities enumerated as "maritime employment" in the Act. See 33 U.S.C. 902(3) (1982 & Supp. V 1987). Petitioner does not dispute this finding.[2] It instead argues (Pet. 6-9) that the determination that a worker is covered if he performed maritime tasks for a portion of his work time, even though he was not engaged in a maritime activity at the moment of injury, conflicts with this Court's decisions in *Northeast Marine Terminal* and *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414 (1985), and with the decisions of other courts of appeals. This argument is without merit.

The court of appeals' decision is clearly consistent with *Northeast Marine Terminal*. There, in examining the landward reach of the 1972 LHWCA amendments for the first time, the Court considered the claims of two workers: a "checker," who was responsible for checking and recording cargo as it was loaded or unloaded, and a longshoreman, who at the time of injury was working as a "terminal laborer" helping to load discharged cargo into trucks. The Court held that the checker satisfied the status requirement because his checking the contents of a container on shore on the day of the accident was "an integral part of the unloading process as altered by the advent of containerization." 432 U.S. at 271. The Court further held that the terminal laborer met

[2] In the court of appeals, petitioner likewise did not challenge the ALJ's and the Board's conclusion that a portion of Smith's employment had been spent in maritime activities.

the status test because he spent at least some of his time in "indisputably longshoring operations." *Id.* at 273. In the Court's view, the Act's "focus on occupations and its desire for uniformity" supported continuous coverage for workers under the LHWCA. *Id.* at 276. See also *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 83 n.18 (1979) (citing with approval "the holding of *Northeast Marine Terminal* * * * that a worker is covered if he spends some of his time in indisputably longshoring operations").

Just this Term, Justice Blackmun, in a concurring opinion joined by Justices Marshall and O'Connor, confirmed the continuing validity of this "amphibious worker" doctrine articulated in *Northeast Marine Terminal* and *Ford*. In *Chesapeake & Ohio Ry.* v. *Schwalb*, the Court held that two terminal workers injured while engaged in janitorial tasks during the ship-loading process, and a pier machinist injured while repairing loading equipment, were "employees" covered by the LHWCA because they were injured while performing tasks essential to the process of loading ships. 110 S. Ct. at 385-386. In joining the Court's opinion, Justice Blackmun wrote separately to stress that "[i]n light of *Northeast Marine Terminal Co.*, * * * it is not essential to [the Court's] holding that the employees were injured while actually engaged in these tasks. They are covered by LHWCA even if, at the moment of injury, they had been performing other work that was not essential to the loading process." 110 S. Ct. at 386. Noting that a purpose of the 1972 amendments was "to solve the problem that under the pre-1972 Act employees would walk in and out of LHWCA coverage," Justice Blackmun stated that to limit coverage to employees who are performing maritime work at the

moment of injury "would bring the 'walking in and out of coverage' problem back with a vengeance." *Id.* at 386-387.[3]

Nor does the court's resolution of the status issue conflict with any decision of another circuit. The appellate courts uniformly have held that workers who spend at least some of their time in undeniably maritime activities, although not engaged in such activities at the moment of injury, are employees for purposes of the Act. *Browning* v. *B.F. Diamond Construction Co.*, 676 F.2d 547, 548 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137, 140 (9th Cir. 1978); *Stockman* v. *John T. Clark & Son, Inc.*, 539 F.2d 264, 274 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977). The decisions cited by petitioner (Pet. 6-7) simply do not address this issue. Instead, they consider whether the injured worker performed any maritime duties at all.[4] None articulates a rule that

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[3] Petitioner's reliance (Pet. 9-10) on *Herb's Welding* is misplaced. There, the Court held that a person whose work consisted solely of welding a gas flow line on a fixed offshore drilling platform was not "engaged in maritime employment" within the meaning of Section 2(3) of the LHWCA. 470 U.S. at 425-426. But neither the Board nor the court below relied on Smith's building and repairing of fixed platform components as establishing his maritime employment. Rather, they correctly relied on his other, indisputably maritime activities to establish that he spent at least a portion of his time in covered employment. See Pet. App. A2-A3, A5, A12.

[4] See *Sanders* v. *Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 1088 (11th Cir. 1988) ("responsibilities as a Labor Relations Assistant satisfy the status test"); *General Dynamics Corp.* v. *Sacchetti*, 681 F.2d 37, 39 (1st Cir. 1982) ("the tasks at issue are a necessary incident to the fabrication of a ship," and therefore are covered); *Fusco* v. *Perini North River Associates*, 622 F.2d 1111, 1113 (2d Cir. 1980)

a worker must be engaged in a maritime task at the time of his injury.[5]

3. The court of appeals' conclusion that Smith's injury occurred on a covered situs also comports fully with the statutory test. Under the LHWCA, benefits are payable for "an injury occurring upon the navigable waters of the United States (including any * * * adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel)." 33 U.S.C. 903(a) (1982 & Supp. V 1987). Smith was injured at petitioner's yard, which the ALJ found "adjoined the navigable waters of the United States." Pet. App. A21. The

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("activities had nothing significant to do with navigation or with commerce on navigable waters," and therefore were not covered), cert. denied, 449 U.S. 1131 (1981); *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1050 (4th Cir. 1980) ("nature of [worker's] duties may not have been fully developed on the record, thereby leaving the question of LHWCA status open for resolution"); *Dravo Corp.* v. *Banks*, 567 F.2d 593, 595 (3d Cir. 1977) (worker's "duties have no traditional maritime characteristics," and therefore are not covered); *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975) (it is "illogical to think of [employee's] work and duties at or on an upland sawmill's log pond as 'maritime employment' "), cert. denied, 429 U.S. 868 (1976).

[5] Petitioner apparently perceives a circuit conflict because it misapprehends the decision below. Contrary to petitioner's assertions (Pet. 5-7), the court simply did not address the question whether a land-based worker who is *not* engaged in one of the enumerated occupations in Section 2(3) must be "directly involved" in or have a "realistically significant relationship to" traditional maritime activities. That is because Smith unquestionably performed some work that is expressly included in the enumeration of occupations in Section 2(3): longshoring and ship building and repairing. Pet. App. A5. See *Chesapeake & Ohio Ry.* v. *Schwalb*, 110 S. Ct. at 385.

ALJ further determined that Smith sustained his injury in the fabrication area of the yard, where components for both vessels and fixed offshore oil drilling platforms were made and repaired, and that "the general area of [petitioner's] fabrication yard was used for the maritime purpose of loading barges." *Id.* at A22. The Board affirmed, likewise concluding that petitioner's "yard was customarily used for its loading and unloading activities, as well as for its fabrication and repair of parts for vessels in addition to its platform work." *Id.* at A14. The court of appeals' situs ruling rests on these findings. See *id.* at A6.

Petitioner appears to challenge (Pet. 10) the court of appeals' situs determination solely on the ground that an oil drilling platform situated in the yard was the precise location of Smith's injury and that such a platform does not meet the Act's situs requirement. This contention misapprehends the statutory scheme. By the terms of Section 3(a), the focus of the Act is on the "area" in which the injury occurred (here, petitioner's yard), not on any particular piece of equipment within that "area." See *Northeast Marine Terminal*, 432 U.S. at 280-281.[6] Any other inquiry would be illogical and contravene the settled rule that the LHWCA " 'must be liberally construed in conformance with its [remedial] purpose, and in a way which avoids harsh and incongruous results.' " *Northeast Marine Terminal*, 432

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[6] Petitioner errs in arguing (Pet. 9-10) that *Herb's Welding* is to the contrary. In that case, the Court held that a welder on an offshore drilling platform was not covered by the LHWCA because he did not have the status of an "employee" within the meaning of the Act, not because such a platform could never be a covered situs. See 470 U.S. at 425.

U.S. at 268, quoting *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953). Because petitioner does not dispute that the yard itself was an "adjoining area," and therefore a covered situs for purposes of the LHWCA, the court of appeals' holding to that effect does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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